NO. 21697

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FORD M. CONVERSE, APPELLANT,

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR,

APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SUPPLEMENTAL BRIEF FOR THE APPELLANT
(DISCUSSION OF UNITED STATES v. COLEMAN)

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A careful reading of Coleman[1] will show that it has no application by analogy to Converse. Coleman affirms and does not change the "prudent man rule" in Castle v. Womble[2] followed in Chrisman v. Miller[3], Cameron v. United States[4] and Best v. Humboldt Placer Mining Co.[5]

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[1]United States, et al, Petitioners v. Alfred E. Coleman, et al, No. 630 - October Term 1967, April 22, 1968, A-1; Coleman v. United States 363 F2 190 (1966); United States v. Alfred Coleman, A-28557 (1962).

[2]Castle v. Womble 19 L.D. 455 (1894), "After a careful consideration of the subject, it is my opinion that where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise would tend to make of little avail, if not entirely nugatory, that provision of the law whereby 'all valuable mineral deposits in lands belonging to the United States . . . are . . . declared to be free and open to exploration and purchase'. For, if as soon as minerals are shown to exist, and at any time during exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be found willing to risk time and capital in the attempt to bring to light and make available the mineral wealth, which lies concealed in the bowels of the earth, as Congress obviously must have intended the explorers should have proper opportunity to do."

[3]Chrisman v. Miller 197 U.S. 313, 322.

[4]Cameron v. United States 252 U.S. 450, 459.

[5]Best v. Humboldt Placer Mining Co. 371 U.S. 334, 335-336.

Coleman approves "the marketability rule" as one aspect of the prudent ma test when applied to building stone which has no intrinsic value. But Coleman teaches that "the marketability rule" is not an issue in regard to minerals of intrinsic value, for these are in small supply and in great demand and command a good market price. A3. This is in accord with the Solicitor's ruling set ou in the Appendix A5: "An intrinsically valuable mineral by its very nature is deemed marketable, and therefore merely showing the nature of the mineral," meets the test of marketability. 69 I.D. 145 (1962). A5.

Therefore the mere showing of the nature of the metals gold, silver, copper, lead and zinc in Converse is sufficient to prove locatable minerals of in trinsic value which are deemed marketable as a matter of law. But in Coleman, wide spread quartzite, a country rock, which extends over a vast area must be proven to be a marketable building stone under the marketability rule and the statutes relating to locatable minerals in order to be locatable.

The difference in locatability between minerals of intrinsic value and other valuable minerals is found in the 1872 Act.[6] Gold, silver, cinnabar, le tin and copper have been defined by statute to be locatable minerals as in Converse. Other minerals can be located but it must be shown they are valuabl as required in Coleman. The Act of 1872 defines locatable minerals and refers to "veins or lodes of quartz or other rock in place bearing gold, silver, cinn abar, lead, tin, copper or other valuable deposits . . ." 30 U.S.C. 23.

It was not until some 20 years after the 1872 Act that the 1892 Act[7] made building stone a locatable mineral.

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[6] 30 U.S.C. 22, Act of March 10, 1872 (17 Stat. 91).
[7] 30 U.S.C. 161, Act of August 4, 1892 (27 Stat. 348).

In Coleman under Section 3 of the 1955 Act,[8] common stone was defined ot to be a locatable mineral within the meaning of the Mining Law of 1872, in- luding building stone. Since Coleman's claims were located prior to the 1955 ct, it became his burden to prove that his stone was marketable and was found n a deposit in land "chiefly valuable for building stone" under the Act of 892.

The construction of controlling statutes in Coleman has no application o Converse i.e., whether building stone is locatable under the 1892 Act, 30 .S.C. 161, and whether it is a common variety of stone under the 1955 Act, 0 U.S.C. 611, simply do not apply to Converse.

In Coleman, it was found that quartzite had no established market. But n Converse, the agency found that the metals were valuable and calculated heir market value based on an average price for the years 1957 through 1961: old $35 per ounce; silver 90 cents per ounce; lead 12.36 cents per pound; opper 29.7 cents per pound, and zinc 11.62 cents per pound. TR 46. Calculat- d at these values, samples of ore of the lode in the Edith Claim (Finding No. 7) veraged approximately three times the average of similar ores mined in the nited States. Samples from the Paymaster averaged some five times the national verage. (Finding No. 14) Appellant's Brief pp. 23, 24, 46.

As observed in Coleman, no prudent man would extract quartzite, having no ntrinsic value, for which there is no demand, where there was no reasonable rospect of success. And it follows that a deposit of such mineral would not e a "valuable mineral deposit" within 30 U.S.C. 22. The Supreme Court said, That the marketability test is usually the critical factor in cases involving onmetallic minerals of widespread occurrence. This is accounted for by the erfectly natural reason that precious metals which are in small supply and for

which there is big demand, sell at a price so high as to leave little room to doubt that they can be extracted and marketed at a profit." It is clear that metals of intrinsic value in a mineral deposit which justify further work, clearly would be a valuable mineral deposit.

As applied to minerals like gold and silver, considered in Chrisman v. Miller, 197 U.S. 313 (1905), there was no question that the end product, the gold and silver, could be sold on the market. Therefore, the present marketability rule inherent in the prudent man rule applied to nonmetallics in Cole has no application to gold and silver and metallic minerals of intrinsic valu in Converse, which are defined by statute to be locatable minerals.

Patents to land were sought in Coleman, but not in Converse. The United States brought action in ejectment and for damages against Coleman in the Uni States District Court. Coleman counterclaimed and asked that the Secretary o the Interior be required to issue to him patents to 18 placer mining claims which the Department had previously declared to be invalid for want of discov The decision of the United States Supreme Court upholding the Secretary is se forth in the Appendix A1-A4. The Interior Department promulgated the marketal ity rule in Interior Department Decision, Solicitor's Opinion, 69 I.D. 145, Sept. 20, 1962, set forth A5-A6.

Unlike Coleman, the United States brought an administrative proceeding against Converse to make his two lode claims subject to the restrictions of Section 4 of the Surface Resources Act of July 23, 1955, 30 U.S.C. Sec. 612. Converse does not seek patents to the claims. He asks that his possessory ti be upheld as valid. He objects to the Government's attempt to apply the Surface Resources Act retroactively to his claims. He maintains that his possesory title was perfected by discovery made prior to the 1955 Act.

The District Court upheld the Secretary, Converse v. Udall, 262 F Supp 583, D.C. Ore. 1966) and Converse was argued in this Court March 18th of this year. he United States Supreme Court decided Coleman April 22, 1968. The Appellee sent copy of Coleman to this Court, which granted leave to file supplemental briefs iscussing whether the Coleman decision has any application to the present appeal n Converse. We think it does not.

The issues differ. In Coleman the Secretary's opinion states that "the nly issue in dispute at the hearing on September 16, 1958, was the existence of a arket for profitable sales before July 23, 1955."

Actually, in Converse, the fact was undisputed that lodes of rock in place ad been discovered, which contained high values in metals declared by the Depart-ent to be metals of intrinsic value: gold,[9] silver,[10] copper,[11] lead,[12] and zinc[13] ssays averaged several times the values of similar ores mined in the United States nd the agency found that a prudent man would be justified in spending time and oney on the claims in order to explore this deposit further.

The sole issue in Converse was whether the kind of further work that a reas-nable man would be justified in doing to determine the extent of the ore deposit nich had been found would come within the rule of Castle v. Womble. The Assist-nt Solicitor held in Converse that "developing a valuable mine", as used in astle v. Womble, did not include "exploration work". This Court has held that he word "development" as applied to discovery is the equivalent of "exploration". harlton v. Kelly, 156 Fed. 433, 436. Development of a mine includes both explor-:ion and stope preparation.

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[9]Mineral Facts and Problems, United States Bureau of Mines Bulletin 585, 347, Gold.
[10]Id. p. 735, Silver.
[11]Id. p. 429, Copper.
[12]Id. p. 235, Lead.
[13]Id. p. 975, Zinc.

The Mining Engineers Handbook[14] defines "exploration" as "the work of ex ploring an ore body when found. It is undertaken to gain knowledge of the si shape, position and value of the ore body." The Handbook defines "developmen as "the driving of openings to and in a proved ore body for mining and handli the ore economically." The Handbook defines "exploitation" as "mining or the work of extracting the ore."

Milvoy M. Suchy, Mining Engineer and Minerals Officer for the Government testified in Converse that exploration work and development work overlap and describe the same kinds of work. He said that if the Converse claims were hi he would, as a prudent man, spend money on the claims. He would bulldoze and drift on the vein. It would be justifiable to spend more money on the proper in an effort to determine the extent of the ore body. Tr 101. He advised Mr Converse to do so. Tr. 100.

For lode claims containing metals of intrinsic value the Department has outlined the elements necessary to establish a valid discovery on a lode clai in the case of Jefferson v. Montana Copper Mines Co., 41 L.D. 32, approved in Chrisman v. Miller, 197 U.S. 313, cited in Coleman, as follows: (1) There mu be a vein or lode of quartz or other rock in place; (2) The quartz or other r in place must carry gold, silver, cinnabar, lead, tin, copper or other valuab deposits; and (3) The two preceding elements, when taken together, must be su as to warrant a prudent man in the expenditure of his time and money in the effort to develop a valuable mine. Converse has met this test.[15]

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[14]Robert Peele, Mining Engineers Handbook (1918), John Wiley & Sons, Boston, Mass., p. 373.

[15]See discussion in Appellant's Brief of the following topics: Lodes we discovered pp. 8-11; Valuable minerals were discovered pp. 11-15; National av erage of ores mined p. 15; Samples of ore taken from claims in Converse avera several times the value of similar ores mined in the United States pp. 11, 1

There are issues[16] in Converse that are not issues in Coleman. Converse as asked this Court to determine whether the Department's position that no dministrative complaint was necessary to be lodged is correct, and whether the ailure to exercise administrative power in accordance with the statutes upon hich that power depends make the administrative proceeding in Converse a null- ty. Converse has asked whether denial of his offers of proof is denial of rial, and whether requested findings denied were material to the issue, and hether his motion for change of Hearing Examiner should have been allowed. All f these relate to a denial of "Due Process".

Coleman discusses the kinds of minerals locatable under the Mining Law. ot all minerals are locatable. Some are excluded by statute.[17] Common stone as excluded by Coleman. The obvious intent was to reward and encourage the earch for minerals that are valuable in an economic sense, and when they are ound in a deposit of potential value to reward the discoverer by protecting is discovery as his own.

In Converse[18] the Department found that the land on which the claims are ocated is mineral in character. "Ruling on requested Finding No. 2." Appell- nt's Brief p. 18. But in Coleman there was no such finding.

The complaint in Coleman charged that the land was not mineral in character, nd it was found that it was not mineral in character. Although we cannot agree hat quartzite is "one of the most common of all solid materials" without economic

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[16]See Appellant's Brief pp. 24-43 and 54-63.

[17]Valuable minerals that are not locatable include: deposits of coal, phos- hate, sodium, potassium, oil, oil shale, or gas (Feb. 25, 1920) 30 U.S.C. Sec. 31; common varieties of sand, stone, gravel, pumice, pumicite, or cinders,) U.S.C. Sec. 611.

[18]In Converse specific findings of fact were requested. The Department uled on seventeen requested findings. Appellant's Brief pp. 18-25.

value, we are bound by this pronouncement. Logically it follows that land is not mineral in character if it contains no economic minerals, but if it does, it is mineral in character and valuable within the meaning of "valuable miner al deposits". 30 U.S.C. Sec. 22.

Coleman did not say, at least with respect to discovery of metals of intrinsic value, that a prospector was required to find a fully developed mine, exploitable at a profit in order to meet the discovery requirements, and this Court pointed out in Adams v. United States, 318 F 2d 861, 870 (CA 9, 1963) that the reasonable prospect of success in developing a valuable mine called for by the "prudent man rule" does not require a showing of value in the sens of proved ability to mine the deposit at a profit. And in United States v. Santiam Copper Mines, Inc., A-28272 (1960), the Department held that: "Contra to the claimant's assertion, the Department does not require a showing that a mining claimant has encountered a deposit which would be commercially profitab immediately. A valuable mine need not be a profitable one."

The Department has long held where minerals are of intrinsic value, as in Converse "no showing that the ore is marketable is required". United States v Heirs of Stack, A-28157 (1960); United States v. Carnes, A-28178 (1960); Unite States v. Jungert, A-28199 (1960); United States v. Shuck, A-27965 (1960); United States v. Parkinson, A-28144 (1960) and United States v. Bartron, A-28 (1960).

For "If it were in the ordinary course of valuable mining claims to appea upon the instant of discovery to be of sufficient value to pay to work them, w make the requirement of these expenditures in development before the issuance patent? The whole spirit of the statute and the constructions given by the learned tribunals that have considered them is not that the prospector must fi

a paying mine before he can locate his claim. If it were, mining and prospecting . . . would suffer an instant and well nigh total paralysis." Cataract Gold Mining Company, 43 Land Department 248; Shreeve v. Copper Belt Mining Company, 11 Mont. 309, 28 P 314, 323.

The Mining Law of 1872 does not impose any condition as to the value or extent of the ore, but simply provides that no location of a mining claim shall be made until the discovery of a vein or lode within the limits of the claim located. Mr. Lindley says in his treatise,[19] "No Court has ever held that in order to entitle one to locate a mining claim, ore of a commercial value, in either quantity or quality, must first be discovered. Such a theory would make most mining locations impossible. Logically carried out, it would prohibit a miner from making any valid location until he had fully demonstrated that the vein, or lode, or quartz or other rock in place bearing gold or silver which he had discovered, would pay all the expenses of removing, extracting, crushing, and reducing the ore, and leave a profit to the owner. If this view should be sustained, it would lead to absurd, injurious and unjust results."

And in the case of Narver v. Eastman, 34 L.D. 123 (1905), quoted with approval in United States v. Mouat, 61 I.D. 293 (1954), the Secretary pointed out: "It does not follow that because there is no clear profit arising from the sale of an article that has been manufactured or produced, that it therefore has no commercial value." The Secretary held that the commercial value of an article does not depend upon whether it can be produced and sold at a profit, since even crops which a farmer may market at a loss still have a commercial value.

Wouldn't it be a harsh and cruel interpretation of the law to say to a prospector that you have no claim until you have demonstrated that you can mine

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[19] Curtis H. Lindley, Treatise on the American Law Relating to Mines and Mineral Lands, Vol. 2, 3rd ed., p. 36.

it at a profit? A prudent prospector may explore and develop his claim, purch mining and processing equipment, build a plant, enter or establish the market his ore, excavate and disturb the surface and subsurface only to be told under such interpretation that he is liable for trespass and damages and he has no title for want of a valid discovery. Title depends on discovery. Cole v. Ral 252 U.S. 286, 296. Without title he is liable for trespass. United States v. Lease, No. 67-1687; United States v. Burrows, No. 67-808-F, in the same Court (USDC Cent. Dist. Cal.). Did Congress ever intend that title to mining claims should fluctuate from validity to invalidity with the fluctuating prices of th markets for minerals and metals?

For nearly a hundred years, the Mining Law has been liberally interpreted to encourage the exploration and development of mineral resources. This inter pretation of long standing has become a rule of property and should not be ove turned by the Courts. It has been acted on for a number of years. Udall v. Tallman, 380 U.S. 1, (1965); Barnes v. Poirier, 64 Fed 14, 19 (1894).

On January 26, 1956, Under Secretary of the Interior, Clarence A. Davis, before a Subcommittee on Legislative Oversight of the Senate, Interior and Insular Affairs Committee and the Subcommittee on Power and Natural Resources of the House Committee on Government Operations explained this long standing interpretation. The Congress has not deemed it appropriate to change this law which has served our nation for so long. Mr. Davis said,

> "Much of the economy of the Western States has been based upon mining. The results of mining operations are always speculative, since it is never possible to state with certainty the value of the minerals under the ground.
>
> "The patenting of mining claims over the years, therefore, has gone forward by the thousands, based only upon a discovery and the hope that a profitable venture can be developed. This must be remembered in any consideration of mining problems.

"Nevertheless, a few years ago, the Department of the Interior attempted to inject into the mining laws a standard of discovery which required profitable operations and a showing that the mineral deposits had the greater comparative value than other uses. This is not the standard set up by law. The Department has the authority to open and close areas to mining locations. When lands are opened, they are subject to the Mining Law as it exists. Whey they are closed, no one can even stake a claim on them.

"To allow mining claims to be located and then to judge them on standards other than those set up by Congress and the Supreme Court is administrative legislation.

"If we are to adopt the philosophy that any department of Government is to be vested with such vast powers, then it should be done by an Act of Congress and not by administrative decision."

Mining claims are not a bounty to be handed out by a benevolent fourth branch f Government[20] and taken back at will. Perfection of a claim has the effect of a rant by the United States of the exclusive possession of the claim so long as it s kept alive by the performance of the annual assessment work. Nygard v. Dickenson 7 F 2d 53, (CAA Alaska 1938). There is no requirement to purchase the fee title rom the Government for title is as good as if secured by patent. Mason v. Washngton Butte Mining Co., 214 F 32, 130 CCA 426 (Montana 1914). There is no reuirement to mine the claims or to produce any metals. Bonner v. Meike, 82 F 697, 99 (CC Nevada 1897); Forbes v. Gracey, 94 U.S. 762, 767, 24 L Ed 313. Possesry title to a mining claim is property in the highest sense of that term. Wilbur . United States ex rel Krushmic, 50 S. Ct. 103, 320 U.S. 306, 74 L Ed 445 (1930); iesenthal v. Goff, 130 P 2d 248, 63 Idaho 342 (1942).

There is a paradox, a conflict in purpose between agencies of the Department the Interior. On the one hand, under the Mineral Resources Development Program,

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[20]Franklin D. Roosevelt commenting about the 1937 report of the President's mmittee on Administrative Management said, "It was a great document of permient importance," and took occasion to remark that the practice of creating lministrative agencies to perform administrative work in addition to Judicial rk threatens to develop a "fourth branch" of the Government for which there not sanction in the Constitution. U.S. Cong. & Adm. News, 79th Congress, d Session 1946, p. 1295.

citizens are encouraged to explore and develop mineral reserves.[21] Seventy-five per cent of exploration costs are contributed by the Government up to $250,000 for certain minerals. If ore is encountered and extracted, the loan is repaid out of a five per cent royalty on the ore sold. If ore is not encountered, or if the ore is not extracted for a period of ten years, the loan is forgiven. The money contributed to the exploration by the Government is not taxable as income. The United States Geological Survey and the United States Bureau of Mines do much good work to encourage exploration for minerals. The long range policy of these agencies contemplates the exploration and development of ore reserves and not their immediate exploitation. And a mining claimant must have a valid title based on discovery before he can obtain funds under this program for exploration.

Yet this policy is frustrated by the determined campaign to invalidate mining claims for want of mineral discovery being waged by some agencies. A recent study of Bureau of Land Management proceedings involving challenge to sufficiency of mineral discovery shows that while a mining claimant stands a small chance of receiving a favorable decision on the Hearing Examiner level, a reversal is certain at the Director or Secretary levels, so that any claims which were held valid below will be ruled on adversely before the case can be submitted to judicial review. Clayton J. Parr, Government Initiated Contests Against Mining Claims--A Continuing Conflict, Utah Law Review Vol. 1968 No. 1, p. 114.

This study quotes from an address by Winston S. Howard, 1967 Metal Mining and Industrial Mineral Convention, American Mining Congress, Sept. 10-13, 1967

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[21] Mineral Resources Development Program, Senate Report No. 1686, June 11, 1958. House Report No. 2276, July 24, 1958. Act of August 21, 1958, (72 Stat. 700), 30 U.S.C. 641-646. FR Doc 65-2294, FR Doc 65-7220, FR Doc 67-10624.

'Of all the litigating cases in which decisions were handed down or published in :he year 1965, not one contested mining claim has been found to be valid." In :he only case found by Mr. Parr where the Director found in favor of the mining :laimant contrary to an unfavorable decision by an Examiner, a further appeal :o the Secretary resulted in reversal against the mining claimant. Op. Cit. 114. nd this discourages the production of gold[22] and silver and metals upon which ur nation depends.

Solicitor Barry stated, "In a sense, in an administrative proceeding within he Department, it is impossible to be a disinterested judge." Hearing on ublic Law 167, 106 note 40; K. Davis, 13.05 at 203. This is not surprising here the Solicitor acts as advocate and judge. He provides counsel for the ureau of Land Management and also conducts the Secretary's review. An Assist- nt Solicitor could expect no accolades for reversing an Examiner's Decision nd finding in favor of a mining claimant contrary to the Bureau's allegations f invalidity.

The suggestion made at page 53 of the Department's Brief to this Court in oleman that only economic idiots will intentionally produce a product at a loss s a false assumption, for a prudent man may produce minerals at a loss under ny circumstances. For instance, he may produce and sell development ore at a oss to reduce the cost of development. He may produce and sell ore at a loss to

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[22]Gold is a commodity universally accepted as the standard to measure the lue of all other commodities. It is our most strategic metal. For the lack it we have been forced to go on a unredeemable paper money, fiat and print- g press money, standard for our currency, the soundness of which determines ether we win or lose the cold wars and the hot wars in which we may engage. ssession of gold was prohibited. Gold Commandeering Act of 1933, 12 U.S.C. 8n. Gold Control Act of 1934, 31 U.S.C. 442. Gold mines were closed during rld War II, War Production Board, Order L208, but during World War I manpower s taken from shipyards to mine gold to support our currency and prevent in- ation.

protect capital investment in a flooded mine, a struck mine, during a depressi a national emergency, or to hold a labor force. If wealthy, he can make money losing money where losses are deductible[23] from other income and gains are cap tal gains. He may develop gold reserves in the ground at a loss and thus ex- change unredeemable paper money[24] of no intrinsic value for gold of intrinsic value. And anyone familar with the complexities, intricacies and burdens of modern business knows that profits are not usually earned during the establish ment of a business and seldom during every fiscal period of a business enterpr

We cannot agree with the implication that the United States is a sole pro prietor of the public lands of Oregon, fifty-two per cent of the State. Its rights are not jus privatum but jus publicum. It is a trustee of the lands.[25] Under the Oregon Admission Act[26] it was agreed that these lands should be sold and part of the proceeds paid to the State of Oregon. Oregon agreed not to ta the lands. It was agreed that the lands would be sold and placed on the local tax rolls to help bear their share of the cost of local Government. The thirt original states, Texas and Hawaii retained all of their public lands. In some public land states, the land has been sold and placed on the tax rolls as agr but not in Oregon.[27]

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[23] Legislative History Income Taxes - Mining - Exploration Expenditures, Senate Report No. 1377. Income Taxes - Natural Resources Deduction. 26 U.S.C 615 (IRC 1954) Exploration Development. Income Taxes - Exclusion from income of Government funds received for Mineral Exploration. 26 U.S.C. 621. Income Tax Regulations - Natural Resources, Sec. 1, 615 (IRC 1954) Sec. 615.

[24] Clifford L. James, Principles of Economics, Barnes & Noble, Inc., N.Y. 9th Ed. (1956), p. 126, "The paper standard is generally adopted involuntaril Because of an emergency, such as a war, paper money is issued to pay extra- ordinary expenses. If the quantity is excessive (and this temptation is grea purchasing power falls and confidence in redeemability is lost. The paper mo becomes fiat money or printing press money. The paper standard is always ex- pressed in terms of the specie standard which existed prior to the inflation, but the paper has displaced the specie as the medium of exchange and the stan ard of value. The United States during the Civil War (greenbacks) and many European nations during the World Wars were on a paper standard."

[25] U. S. Bureau - The Census, Statistical Abstract of the United States 1966 (87 Edition) Washington, D.C. at p. 198. Federally owned 766 million acres, nonfederally owned 1505 million acres 1965 at p. 197, in United States

[26] Act for the Admission of Oregon into the Union, 1859.

Unlike Mr. Coleman, Mr. Converse would acquire no title to land or timber. e seeks to prevent his mining claims from being declared invalid for want of iscovery, to make them good against withdrawal of the land from mineral entry.[28] is aim is to prevent retroactive application of the Surface Resources Act to is claims.

Whether or not the claims are timbered is immaterial to the issue of dis- overy. If admissible to show Mr. Converse's interest in the case to discredit is testimony, then such evidence has no probative value, for he does not anchor is case on his own testimony. There is no evidence that timber on the claims ad any value when Mr. Converse and his father before him went after the minerals n them.

If the timber now would have value greater than the cost of harvesting it, at would not be grounds for invalidating the claims. It has been held in nited States v. Iron Silver Mining Co., 128 U.S. 684, that if a mining claimant ught ownership of claims chiefly on account of the value of the lands and timb- growing on them, it would not affect the applicant's claims so long as they re supported by mineral discovery. The Supreme Court said, "A prudent miner ting wisely in taking up a claim, whether for a placer mine, or for a lode or in, would not overlook such circumstances, and they may in fact control his tion in making the location." Congress has declared that land, even in nation- forests, is open to mineral entry. No added burdens are imposed; the land is bject to the mining laws. 16 U.S.C. 482.

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[28] Volume 1 American Law of Minerals, see 2.62; Reservations of Land, 17 Op. ty. Gen. 230.

CONCLUSION

We have shown that Coleman has no application to Converse by analogy. Coleman affirms the "prudent man rule". It applies the "marketability rule" to determine the locatability of stone of common variety.

But as to metals defined by statute to be locatable, the marketability rule has no application, for they are deemed to be valuable as a matter of law. Therefore, the marketability rule has no application to the metals of intrinsic value discovered in Converse, which are defined by statute to be locatable.

The issue in Coleman was to determine whether building stone was locatable. Converse presents no such issue. In Converse, there was no dispute that metals of intrinsic value are locatable.

In Converse, the Department found as a matter of fact that the lands were mineral in character. But in Coleman, it was found that they were not.

The question presented in Coleman was whether the building stone had economic value and was a kind of mineral locatable under the statute. The only question raised about discovery in Converse is whether, after a deposit containing metals of intrinsic value has been discovered, exploration work is the kind of work a reasonably prudent man would do in "developing a valuable mine" under the Castle v. Womble rule.

We have shown that "development" includes "exploration" work by definition of this Court and by usage of the mining industry, and it is established by the testimony of Milvoy Suchy, the Chief Minerals Officer in Converse, that "exploration" and "development" work overlap. If the claims were his, he would bulldoze and drift on the vein to determine the extent of the ore body, and he advised Mr. Converse to do so. This work to increase knowledge of an ore body that had been discovered should not be equated to prospecting for an ore body yet unknown.

Coleman does not hold that it is necessary to find a mine fully explored and ready to be exploited at a profit before a discovery has been accomplished. It is not necessary to prove that the ore can be mined profitably to meet the discovery requirement. The discovery is sufficient if the discovery is a potential ore producer and there is a reasonable prospect of future profitability after more work has been done to turn the mineral deposit into a mine. Converse meets the test of discovery; Coleman did not.

We respectfully submit that the decision of the United States District Court in Converse should be reversed.

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I hereby certify that in connection with the preparation of this supplemental brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the original brief of Appellant filed herein, as supplemented by this supplemental brief discussing the application to this case to the United States Supreme Court's decision in United States v. Coleman, pursuant to leave of Court, are in full compliance with these rules.

William B. Murray

A P P E N D I X

APPENDIX A

SUPREME COURT OF THE UNITED STATES

No. 630.--October Term, 1967.

United States et al., Petitioners,	)	
	)	On Writ of Certiorari
v.	)	to the United States
	)	Court of Appeals for
Alfred E. Coleman et al.	)	the Ninth Circuit.

[April 22, 1968]

Mr. Justice Black delivered the opinion of the Court.

In 1956 respondent Coleman applied to the Department of the Interior for a patent to certain public lands based on his entry onto and exploration of these lands and his discovery there of quartzite stone, one of the most common of all solid materials. It was, and still is, respondent Coleman's contention that the quartzite deposits qualify as "valuable mineral deposits" under 30 U.S.C. Sec. 22[1] and make the land "chiefly valuable for building stone" under 30 U.S.C. Sec. 161.[2] The Secretary of the Interior held that to qualify as "valuable mineral deposits" under 30 U.S.C. Sec. 22 it must be shown that the mineral can be "extracted, removed and marketed at a profit"--the so-called "marketability test". Based on the largely undisputed evidence in the record, the Secretary concluded that the deposits claimed by respondent Coleman did not meet that criterion. As to the alternative "chiefly valuable for building stone" claim, the Secretary held that respondent Coleman's quartzite building stone as a "common variet[y] of stone" within the meaning of 30 U.S.C. Sec.

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[1]The cornerstone of federal legislation dealing with mineral lands is the Act of May 10, 1872, 17 Stat. 91, 30 U.S.C. Sec. 22, which provides in Sec. 1 that citizens may enter and explore the public domain and, if they find "valuable mineral deposits," may obtain title to the land on which such deposits are located by application to the Department of the Interior. The Secretary of the Interior is "charged with seeing . . . that valid claims . . . [are] recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, 252 U.S. 450, 460.

[2]The 1872 Act, supra, was supplemented in 1892 by the passage of the Act of August 4, 1892, 27 Stat. 348, 30 U.S.C. Sec. 161, which provides in Sec. 1 in pertinent part: "That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims: . . . ."

611,[3] and thus it could not serve as the basis for a valid mining claim unde the mining laws. The Secretary denied the patent application, but responden Coleman remained on the land, forcing the Government to bring this present action in ejectment in the District Court against respondent Coleman and his lessee, respondent McClennan. The respondents filed a counterclaim seeking have the District Court direct the Secretary to issue a patent to them. The District Court, agreeing with the Secretary, rendered summary judgment for t Government. On appeal the Court of Appeals for the Ninth Circuit reversed, holding specifically that the test of profitable marketability was not a pro per standard for determining whether a discovery of "valuable mineral deposi under 30 U.S.C. Sec. 22 had been made and that building stone could not be deemed a "common variet[y] of stone" under 30 U.S.C. Sec. 611. We granted t Government's petition for certiorari because of the importance of the decisi to the utilization of the public lands. --U.S.--.

We cannot agree with the Court of Appeals and believe that the rulings the Secretary of the Interior were proper. The Secretary's determination th the quartzite stone did not qualify as a valuable mineral deposit because th stone could not be marketed at a profit does no violence to the statute. In deed, the marketability test is an admirable effort to identify with greater precision and objectivity the factors relevant to a determination that a mir al deposit is "valuable". It is a logical complement to the "prudent man te which the Secretary has been using to interpret the mining laws since 1894. Under this "prudent man test" in order to qualify as "valuable mineral depos the discovered deposits must be of such a character that "a person of ordina prudence would be justified in the further expenditure of his labor and mean with a reasonable prospect of success, in developing a valuable mine. . . ." Castle v. Womble, 19 L.D. 455, 457 (1894). This Court has approved the prud man formulation and interpretation on numberous occasions. See, for example Chrisman v. Miller, 197 U.S. 313, 322; Cameron v. United States, 252 U.S. 45 459; Best v. Humboldt Placer Mining Co., 371 U.S. 334, 335-336. Congress ha made public lands available to people for the purpose of mining valuable mir al deposits and not for any other purpose.[4] The obvious intent was to rewar and encourage the discovery of minerals that are valuable in an economic sen Minerals which no prudent man will extract because there is no demand for th at a price higher than the costs of extraction and transportation are hardly economically valuable. Thus, profitability is an important consideration in applying the prudent-man test, and the marketability test which the Secretar has used here merely recognizes this fact.

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[3]Section 3 of the Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. Sec. 611, provides in pertinent part as follows: "A deposit of common varieties of sand, stone, gravel, pumice, pumicite, or cinders shall not be deemed a valu able mineral deposit within the meaning of the mining laws of the United St so as to give effective validity to any mining claim hereafter located under such mining law. . . . 'Common varieties' as used in this Act does not inc the deposits of such materials which are valuable because the deposit has s property giving it distinct and special value. . . ."

[4]17 Stat. 92, 30 U.S.C. Sec. 29, provides in pertinent part as follows. patent for any land claimed and located for valuable deposits may be obtain in the following manner: Any person . . . having claimed and located a pie

The marketability test also has the advantage of throwing light on a claimant's intention, a matter which is inextricably bound together with valuableness. For evidence that a mineral deposit is not of economic value and cannot in all likelihood be operated at a profit may well suggest that a claimant seeks the land for other purposes. Indeed, as the Government points out, the facts of this case--the thousands of dollars and hours spent building a home on 720 acres in a highly scenic national forest located two hours from Los Angeles, the lack of an economically feasible market for the stone, and the immense quantities of identical stone found in the area outside the claims--might well be thought to raise a substantial question as to respondent Coleman's real intention.

Finally, we think that the Court of Appeals' objection to the marketability test on the ground that it involves the imposition of a different and more onerous standard on claims for minerals of widespread occurrence than for rarer minerals which have generally been dealt with under the prudent-man test is unwarranted. As we have pointed out above, the prudent-man test and the marketability test are not distinct standards, but are complementary in that the latter is a refinement of the former. While it is true that the marketability test is usually the critical factor in cases involving nonmetallic minerals of widespread occurrence, this is accounted for by the perfectly natural reason that precious metals which are in small supply and for which there is a great demand, sell at a price so high as to leave little room to doubt that they can be extracted and marketed at a profit.

We believe that the Secretary of the Interior was also correct in ruling that "in view of the immense quantities of identical stone found in the area outside the claims, the stone must be considered a 'common variety'" and thus falling within the exclusionary language of the 1955 Act, 30 U.S.C. Sec. 611, which declares that "[a] deposit of common varieties of . . . stone . . . shall not be deemed a valuable mineral deposit within the meaning of the mining laws. . . . " Respondents rely on the earlier 1892 Act, 30 U.S.C. Sec. 161, which makes the mining laws applicable to: lands that are chiefly valuable for building stone" and contend that the 1955 Act has no application to building stone, since, according to respondents, "[s] tone which is chiefly valuable as building stone is, by that very fact, not a common variety of stone." This was also the reasoning of the Court of Appeals. But this argument completely fails to take into account the reason why Congress felt compelled to pass the 1955 Act with its modiciation of the mining laws. The legislative history makes clear that this Act (30 U.S.C. Sec. 611) was intended to remove common types of sand, gravel, and stone from the coverage of the mining laws, under which they served as a basis for claims to land patents, and to place the disposition of such materials under the Materials Act of 1947 (30 U.S.C. Sec. 601), which provides for the sale of such materials without disposing of the land on which they are found. For example, the Chairman of the House Committee on Interior and Insular Affairs explained the 1955 Act as follows:

> "The reason we have done this is because sand, stone, gravel . . . are really <u>building materials</u>, and are not the type of materials contemplated to be handled under the mining laws, and that is precisely where we have so much abuse under the mining laws. . . ." 101 Cong. Rec. 8743. (Emphasis in text)

Similarly, the Senate Committe Report stated that the bill was intended to:

> "Provide that deposits of common varieties of sand, building stone, gravel, pumice, pumicite, and cinders on the public lands, where they are found in widespread abundance, shall be disposed of under the Materials Act of 1947 (61 Stat. 681), rather than under the mining law of 1872." S. Rep. No. 554, 84th Cong., 1st Sess., p. 2. (Emphasis in text)

Thus we read 30 U.S.C. Sec. 611, passed in 1955, as removing from the coverag of the mining laws "common varieties" of building stone, but leaving 30 U.S.C Sec. 161, the 1892 Act, entirely effective as to building stone that has "son property giving it distinct and special value" (expressly excluded under Sec. 611).

For these reasons we hold that the United States is entitled to eject respondents from the land and that respondents' counterclaim for a patent must fail. The case is reversed and remanded to the Court of Appeals for the Ninth Circuit for further proceedings to carry out this decision.

It is so ordered.

Mr. Justice Marshall took no part in the consideration or decision of this case.

APPENDIX B

Interior Department Decision Solicitor's Opinion
69 I.D. 145, Sept. 20, 1962

69 I.D. 145

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

M-36642

September 20, 1962

To: Assistant Secretary, Public Land Management.

Subject: Review of the "Marketability Rule" as applied to the Law of Discovery.

Your memorandum to the Secretary requesting a review of this rule has been referred to this office for reply.

After giving careful consideration to this subject, it is our conclusion that there is no basis for making any change in the test which the Department applies to mining claims in determining whether there has been a valid discovery. However, we believe that, since our decisions may have been misunderstood and an undue rigidity may have been ascribed to them, we should explain the position taken.

The test which we apply, the prudent man test, is based upon the provision of R.S. 2319 (30 U.S.C. sec. 22) that only "valuable mineral deposits, may be located. A valuable mineral deposit, it has been held, is one the discovery of which would justify a man of ordinary prudence in the further expenditure of time and money with a reasonable prospect of success in the effort to develop a paying mine. Castle v. Womble, 19 L.D. 455 (1894); Chrisman v. Miller, 197 U.S. 313 (1905).

The marketability rule about which you have particularly asked our views is merely one aspect of this test. The Department and the courts have, we believe, rightly held that a prudent man would not be justified in developing a mineral deposit if the extracted minerals were not marketable. This marketability test is in reality applied to all minerals, although it is often mistakenly said to be applied solely to nonmetallic minerals of wide occurrence. Many minerals are deemed intrinsically valuable.

An intrinsically valuable mineral by its very nature is deemed marketable, and therefore merely showing the nature of the mineral usually meets the test of marketability. On the other hand, where we are concerned with a nonmetallic mineral found in a great many places, application of the prudent man test requires that a market for the mineral be shown by the locator. The extreme example is probably sand and gravel, which are found in every State. There is a demand for sand and gravel, but in many areas the available deposits far exceed the market. In such cases we must insist that the locator show that there is a market actually existing for his minerals. To validate any sand and gravel claim proof of present marketability must be clearly shown.

Other cases fall between the two extremes of the intrinsically valuable mineral on the one hand and sand and gravel on the other hand. Each case mu be judged on its own merits. When a nonmetallic mineral is not of extremely wide occurrence and when a general demand for that mineral exists, it may be enough, instead of showing an actually existing market for the products of t particular mine, to show that a general market for the substance exists of a type which a reasonably prudent man would be justified in regarding as one i which he could dispose of those products.

There are two points which we wish to stress. The first is that the marketability test is only one aspect of the prudent man test, albeit a very important aspect since in the absence of marketability no prudent man would seem justified in the expenditure of time and money. The second is that eac case must be judged on its own facts. Too rigid application of rules mistak interpreted from departmental decisions could lead to incorrect decisions i the field.

(Sgd) Frank J. Barry,
Solicitor